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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

JOSE CARRILLO, as Trustee, etc.,

Plaintiff and Appellant,

v.

J & J RANCH PRODUCE, INC.,

Defendant and Respondent.

F075215

(Super. Ct. No. 14CECG00774)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Jeffrey Y. Hamilton, Jr., Judge.

Jose Carrillo, in pro. per., for Plaintiff and Appellant.

No appearance for Defendant and Respondent.

-ooOoo-

Plaintiff Jose Carrillo, as trustee of the Daniela M. Carrillo Trust (Carrillo), appeals in propria persona from the judgment in favor of defendant J & J Ranch Produce, Inc. (J & J) following a court trial on Carrillo's claims for breach of contract, fraud and common counts. The trial court found that Carrillo could not state a claim upon which relief could be granted because Carrillo materially breached the oral contract he had with

* Before Detjen, Acting P.J., Meehan, J. and DeSantos, J.

J & J, and J & J established the defense of accord and satisfaction. Carrillo contends the trial court erred in finding there was an accord and satisfaction. In designating the record on appeal, however, Carrillo elected to proceed without a reporter's transcript and designated only a partial clerk's transcript. As Carrillo's showing on appeal is insufficient, we affirm the judgment.¹

FACTUAL AND PROCEDURAL BACKGROUND

We take our factual recitation from the trial court's statement of decision.

J & J is in the business of marketing produce, while Carrillo grows produce for commercial gain. J & J began a business relationship with Carrillo in 2012, based on an oral contract by which J & J agreed to give a pre-harvest advance for the estimated yield of Carrillo's grapes for the 2012 season and Carrillo agreed to provide his grapes for inspection, pick-up, storage and sale by J & J. All grapes were to be packaged in J & J trademarked boxes. The grapes were harvested on a continuous basis, in set allotments during the growing season, and the price paid was based on the market price at the time of each sale. The grape prices would rise and fall based on market conditions at the time J & J negotiated and finalized sales to its buyers. J & J received a set commission based on the total amount of the sale. J & J provided a detailed accounting of all grapes by price, amount, type, packing and commissions earned on a weekly basis. The 2012 season was completed without issue.

J & J and Carrillo agreed to the same oral contract for the 2013 growing season. On May 22, 2013 and June 5, 2013,² J & J gave Carrillo two checks totaling \$60,000,

¹ J & J has not filed a respondent's brief or otherwise participated in the appeal. The failure to file a respondent's brief does not constitute a default, i.e., the appealed order is not automatically reversed. (*In re Bryce C.* (1995) 12 Cal.4th 226, 232.) We consider the appellant's brief, independently examine the record on appeal, and reverse only if prejudicial error is found. (*Id.* at pp. 232-233; *Kennedy v. Eldridge* (2011) 201 Cal.App.4th 1197, 1203; see Cal. Rules of Court, rule 8.220(a)(2).)

² Subsequent references to dates are to dates in 2013 unless otherwise noted.

which Carrillo cashed. Per the oral agreement, J & J provided weekly summaries to Carrillo without issue or dispute, with the exception of two transactions on July 29 and 30, which resulted in a bona fide billing dispute between J & J and Carrillo.

Carrillo brought the billing dispute to J & J's attention on September 16 through a written demand for payment, which he faxed to J & J. Carrillo prepared a handwritten summary, accounting and demand for payment to "Farmers Fresh Fruit Co." for the amount of \$13,074.21. Farmers Fresh Fruit Company (Farmers Fresh) is J & J's direct competitor.

At trial, Carrillo produced a business card from "Mike Hatcher" as "Sales Manager" for "Farmers Fresh Fruit Company." On the back of the card were handwritten notations and the date of "7-30-13." Carrillo testified the card was created at his demand to memorialize the terms set forth by Carrillo, Farmers Fresh and Jerry Huerta.³ Tommy Vasquez, Carrillo's field supervisor, testified Hatcher and Carrillo discussed the possibility of Farmers Fresh taking over the remaining harvest sales for the 2013 season.

In reliance upon an agreement between Farmers Fresh and Carrillo, Farmers Fresh gave Carrillo a "harvest advance" check of \$2,340 for 585 boxes, which Carrillo cashed. Thereafter, Farmers Fresh provided Carrillo with a detailed accounting of its sales of 1,571 boxes of Carrillo's grape harvest and tendered payments to Carrillo accordingly.

Carrillo's agreement with Farmers Fresh and Huerta created confusion between J & J and Carrillo. The first shipment of grapes packed in 576 reusable plastic containers (RPCs) was mistakenly received by Aslan Cold Storage as J & J inventory, even though it was not packed in J & J boxes as required by the agreement between J & J and Carrillo.

³ At trial, Carrillo contended Huerta was acting as J & J's agent. J & J, however, argued Huerta was an independent contractor. Both Jeff Roberts, J & J's president, and Julie Fargo, the person most knowledgeable at J & J about Carrillo's account, testified that Huerta never had authority to negotiate price or contract terms with any of J & J's clients, and he did not have such authorization or authority in this case. No one at J & J knew about Farmers Fresh's intervention until after the fact.

J & J was then faced with the choice of rejecting the shipment in its entirety or incurring the additional cost of repacking all 576 of the RPCs into J & J boxes, which would have led to additional cost to Carrillo. As a result, J & J sold the 576 RPC packed grapes directly to Farmers Fresh.

After this initial shipment, Aslan Cold Storage mistakenly received two additional shipments as J & J inventory on July 29 and 30. As to these two shipments, which were placed into Farmers Fresh packaging in the field, J & J told Aslan Cold Storage to transfer the orders to Farmers Fresh's inventory, which it did.

Farmers Fresh subsequently failed to perform its duties under its contract with Carrillo. On September 11, Farmers Fresh tendered a \$4,592.34 check payable to Carrillo, on which was written, in all capital letters, "Final Growers Liquidation." Carrillo refused to cash the check.

J & J disputed that it owed Carrillo any money related to the July 29 and 30 grape shipments. In an effort to put the matter to rest, J & J sent Carrillo a letter on September 26 and provided a "Final Accounting 2013" to close out its account with Carrillo for the 2013 season. J & J also sent Carrillo a \$74,019.24 check payable to the "Daniela M. Carrillo Trust," which had prominently marked on it "Final Payment on 2013 Season." Carrillo cashed the check.

Carrillo filed this action in March 2014. The operative first amended complaint, filed in November 2014, alleged causes of action against J & J for fraud (intentional and negligent misrepresentation, concealment, promise without intent to perform), breach of contract and common counts.⁴ Carrillo alleged that J & J, through its agent Jerry Huerta, agreed to purchase three orders of boxed grapes – 585 boxes at \$10.55 per box, 352 boxes at \$15 per box, and 734 boxes at \$14.55 per box – which Carrillo agreed to

⁴ Farmers Fresh, which also was named as a defendant, defaulted. As of the trial date, Carrillo had not taken any action to perfect a judgment against Farmers Fresh.

package and ship to J & J. Carrillo further alleged that upon receiving the grapes and after he demanded payment, J & J denied ordering the produce or entering into an agreement to purchase the grapes, but rather claimed the order was for the benefit of a third party account, namely Farmers Fresh. Carrillo sought \$13,074.21 in general damages, along with interest and punitive damages.

In its answer, J & J denied the allegations of the complaint and alleged 13 affirmative defenses. The defenses included that Carrillo failed to state a cause of action upon which relief may be granted and his claims were barred by the doctrine of accord and satisfaction.

A two-day court trial was held on July 19 and 20, 2016, at which testimony and documentary evidence were received. A proposed statement of decision and judgment was submitted to the trial court in October 2016, to which Carrillo filed objections.⁵

On December 13, 2016, the trial court filed its statement of decision and judgment. The trial court found that Carrillo and J & J had a verbal contract that was in full force and effect, J & J was performing all of the contract's terms and would have been fully capable and willing to finish the contract for the 2013 season. The court found Carrillo materially breached the contract by: (1) accepting additional payment from Farmers Fresh for the produce J & J already agreed to market; (2) entering into an agreement with Farmers Fresh for the sale of the 2013 grape harvest; (3) authorizing the packaging of the grapes in RPC containers; and (4) negotiating directly with a prospective customer for a fixed price without notifying a J & J authorized sales agent. Since Carrillo breached the parties' agreement, he could not state a claim upon which relief may be granted, as J & J was discharged from any further contractual obligations that were due Carrillo and J & J

⁵ Carrillo's trial attorney filed objections on October 25, 2016. The trial attorney filed a substitution of attorney on December 5, 2016, which relieved him as counsel of record and substituted Carrillo in propria persona. The next day, Carrillo filed a "pro per objection" to the proposed statement of decision and judgment.

paid Carrillo for all debts owed with the exception of those debts directly attributable to Carrillo's breach.

The trial court also found J & J established all the elements of its affirmative defense of accord and satisfaction. A bona fide dispute existed between J & J and Carrillo regarding the July 29 and 30 grape shipments because of the lack of J & J packaging and the fact Carrillo demanded payment of \$13,074.21 from Farmers Fresh. J & J made it clear the \$74,019.24 payment was intended as final payment for the 2013 season, as the September 26 letter bears the heading "Final Accounting 2013," sets forth a detailed summary of all payments made to Carrillo for the 2013 season and concludes with a highlighted "Balance Due" of \$74,019.24. In addition, the check bears the clear and prominent notation "Final Payment on 2013 Season." Carrillo knew J & J intended this to be the final payment of the season because Carrillo's representatives can read and write English, and Carrillo previously rejected Farmers Fresh's attempt to reach an accord and satisfaction.

The trial entered judgment in J & J's favor and found it to be the prevailing party for purposes of posttrial cost and fee recovery.

DISCUSSION

Carrillo argues the trial court erred in finding there was an accord and satisfaction because: (1) his "cashing of a check for undisputed grape loads cannot constitute accord and satisfaction for different grape loads J & J never even ordered"; (2) J & J never intended to settle any dispute involving the July 29 and 30 loads since it did not inventory the loads as theirs or include them in the final accounting or check; (3) the check did not state that it was "payment in full"; and (4) there was no consideration since J & J did not give up anything by paying what it admittedly owed for the undisputed loads and Carrillo did not surrender anything by accepting what was undisputedly due him.

The fatal problem with this appeal is that Carrillo fails to provide us with a reporter's transcript of the court trial or any other adequate statement of the evidence.

The record consists of a partial clerk's transcript which includes the following trial documents: (1) the first amended complaint; (2) J & J's answer; (3) Carrillo's objection to the proposed statement of decision, filed by his attorney; (4) Carrillo's in propria persona objection to the proposed statement of decision; and (5) the trial court's statement of decision and judgment. After the clerk's transcript was filed, we granted Carrillo's request to augment the record with a trial exhibit, "Deft Exhibit # 101," which is the September 26 "Final Accounting 2013" from J & J to Carrillo.

Without the reporter's transcript, we have no record of the trial testimony. Accordingly, there is no evidence before us from which we can analyze Carrillo's claims of error. While we have a trial exhibit, it has long been settled that, when no reporter's transcript is provided, the appellate court may not consider exhibits filed as part of a clerk's transcript and the exhibits cannot be used to establish error; the appeal is treated as a judgment roll appeal. (See, e.g., *Williams v. Inglewood Board of Realtors* (1963) 219 Cal.App.2d 479, 481.)

On a judgment roll appeal, " '[t]he question of the sufficiency of the evidence to support the findings is not open.' " (*Allen v. Toten* (1985) 172 Cal.App.3d 1079, 1082.) Instead, we presume the trial court's findings are supported by substantial evidence, and we can consider only whether the judgment is supported by the findings or whether reversible error appears on the face of the record. (*Nielsen v. Gibson* (2009) 178 Cal.App.4th 318, 324–325 [where an appellant fails to provide a reporter's transcript of a trial preceding a judgment, we presume that the evidence is sufficient to sustain the trial court's findings and our review is limited to determining whether any error appears on the face of the record]; *Fitch v. Pacific. Fid. Life Ins. Co.* (1975) 54 Cal.App.3d 140, 143, fn. 1 ["This appeal is based upon only the clerk's transcript and, as such, is considered to be upon the judgment roll alone. [Citation.] Hence the trial court's findings of fact and conclusions of law are presumed to be supported by substantial evidence and are binding upon us, unless the judgment is not supported by the findings or

reversible error appears on the face of the record.”]; *Ruzich v. Boro* (1943) 58 Cal.App.2d 541, 543; see Cal. Rules of Court, rule 8.163 [“The reviewing court will presume that the record in an appeal includes all matters material to deciding the issues raised. If the appeal proceeds without a reporter’s transcript, this presumption applies only if the claimed error appears on the face of the record.”].) On a judgment roll appeal, we presume that the judgment is correct and is supported by the evidence. (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 353, pp. 401–402.)

Notwithstanding these well-established standards, Carrillo seeks to prove reversal is justified based on an exhibit admitted at trial. Pursuant to the applicable standard of review, however, we are unable to rely on the exhibits in any manner. (See *Tibbets v. Robb* (1958) 158 Cal.App.2d 330, 336–337.) Accordingly, as to each of Carrillo’s arguments on appeal, the initial question is whether the claimed error appears on the face of the record. (*Id.* at p. 337.)

We acknowledge that Carrillo is representing himself on appeal. While under the law one may act as his own attorney, when a litigant does so, he is held to the same restrictive rules of procedure and evidence as an attorney. (*Nelson v. Gaunt* (1981) 125 Cal.App.3d 623, 638–639; *Monastero v. Los Angeles Transit Co.* (1955) 131 Cal.App.2d 156, 160–161.) Nevertheless, we conclude that as to all of Carrillo’s appellate arguments, no error appears on the face of the record and the proceedings in the trial court are presumed to support the trial court’s ruling.

DISPOSITION

The judgment is affirmed. Each party shall bear its own costs on appeal.